Supreme Court, U. S.
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No. 98-1784

IN THE

Supreme Court of the United States

TERESITA PACK,

Petitioner,

v.

KMART CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Kmart Corporation has no parent corporations and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Background Facts

Petitioner Teresita Pack became employed by Respondent Kmart Corporation in 1976 in its Muskogee, Oklahoma retail store. After working in various positions over the next several years, in 1987 Ms. Pack accepted a pharmacy technician position with Kmart.

As the Court of Appeals noted, in late 1993 Ms. Pack's work performance began to decline. She began making errors in the pharmacy, including mislabeling prescriptions and incorrectly entering prescription data in the pharmacy computer. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1302 (10th Cir. 1999).[1]

In late 1993 Ms. Pack began seeing her family physician for stress related problems. Her physician referred her to Dr. Koduri, a psychiatrist. Dr. Koduri first examined Ms. Pack in July 1994 and observed symptoms such as decreased attention/concentration. He diagnosed her with moderate to severe depression and prescribed antidepressants.

Prior to her initial consultation with Dr. Koduri, on June 22, 1994, Ms. Pack, with Kmart's approval, took a medical leave of absence from work. She returned to work on August 8, 1994, with no restrictions. On September 9, 1994, Ms.

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1. Ms. Pack states in her Petition that she had "an excellent work record" while employed with Kmart. Petition at 2. However, as correctly noted by the Court of Appeals, the annual evaluation Ms. Pack received on August 12, 1994, reflected an unsatisfactory rating as a result of her errors and her poor performance in the pharmacy. 166 F.3d at 1302.

Pack took a second medical leave of absence at the recommendation of Dr. Koduri, also with Kmart's approval. Her leave extended until January 5, 1995. At that time she returned to work with a note from Dr. Koduri clearing her return with no restrictions other than fewer hours for her first few weeks.

Upon her return to work Ms. Pack continued to make prescription errors. As a result of these errors, on February 2, 1995, Kmart discharged her.

B. Course of Proceedings and Disposition Below

Ms. Pack filed this action in December 1996 against Kmart and one of its pharmacists, Stephen Nicholas. Ms. Pack asserted Kmart was liable to her for (1) failing to accommodate her disability in violation of the Americans with Disabilities Act ("ADA"); (2) discharging her in violation of the Age Discrimination In Employment Act ("ADEA"); (3) discharging her in violation of Title VII's prohibition of gender-based discrimination; and (4) intentional infliction of emotional distress. Ms. Pack asserted the last claim against Mr. Nicholas as well. Prior to trial Ms. Pack voluntarily dismissed her ADEA and Title VII claims.

The case proceeded to jury trial on the ADA and intentional infliction of emotional distress claims. With respect to her ADA claim, Ms. Pack asserted she suffered from major depression, a mental impairment, and the depression substantially limited her in the major life activities of sleeping and concentrating. Ms. Pack further asserted Kmart failed to provide a reasonable accommodation for her alleged disability in the form of a transfer to a different department.

After presentation of all the evidence, Kmart and Mr. Nicholas moved for a directed verdict in accordance with Fed. R. Civ. P. 50. Concerning Ms. Pack's ADA claim, the District Court held that sleeping and concentrating are not major life activities. The District Court further held that even if sleeping and concentrating were major life activities, Ms. Pack failed to present evidence from which a reasonable juror could conclude her mental impairment substantially limited her in these major life activities. Based upon these holdings, the District Court did not address Kmart's other arguments in support of its motion for directed verdict on Ms. Pack's ADA claim.[2] The District Court granted Kmart a directed verdict on the ADA claim, and granted Kmart and Mr. Nicholas a directed verdict on Ms. Pack's intentional infliction of emotional distress claim, and entered judgment accordingly.

Ms. Pack appealed only that part of the District Court's judgment directing a verdict in Kmart's favor on her ADA claim. The Court of Appeals held that sleeping is a major life activity, but that concentrating is not. The Court of Appeals then held that Ms. Pack failed to present sufficient evidence from which a reasonable juror could conclude that her mental impairment (major depression, moderate to

2. Kmart also contended it was entitled to a directed verdict on the grounds that (1) Ms. Pack failed to present sufficient evidence from which a reasonable juror could conclude that in January 1995 she as a "qualified individual with a disability," that is, an individual with a disability who, with or without a reasonable accommodation, could perform the essential functions of her job as a pharmacy technician; and (2) Ms. Pack failed to present sufficient evidence from which a reasonable juror could conclude that Kmart had knowledge after January 5, 1995 (the date Ms. Pack returned to work from a medical leave of absence) of a limitation requiring an accommodation.

severe) substantially limited her in the major life activity of sleeping. Accordingly, the Court of Appeals affirmed the District Court's judgment.

Because the Court of Appeals held that concentrating is not a major life activity, and that Ms. Pack did not present legally sufficient evidence that her mental impairment substantially limited the major life activity of sleeping, the Court of Appeals did not address the other arguments presented by Kmart for affirmance of the District Court's judgment.[3]

C. The Petition for a Writ of Certiorari

Ms. Pack requests this Court grant certiorari to review the opinion of the Court of Appeals. Ms. Pack contends that, with respect to the Court of Appeals' determination that concentrating is not a major life activity, (1) the Court of Appeals' decision is in conflict with this Court's decision in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), and (2) the Court of Appeals' decision is in conflict with the decision of the Eleventh Circuit in *Pritchard v. Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996), *amended on other grounds*, 102 F.3d 1118, *cert. denied*, 117 S. Ct. 2453 (1997), and regulatory guidelines promulgated by the Equal

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3. In its Answer Brief in the Court of Appeals, Kmart contended the District Court's judgment should be affirmed, in addition to the grounds relied upon by the Court of Appeals, because (1) Ms. Pack did not provide sufficient evidence from which a reasonable juror could conclude she was "substantially limited" in the ability to concentrate; (2) Ms. Pack did not present evidence she was a qualified individual with a disability; and (3) even if Ms. Pack were a qualified individual with a disability, Kmart was not required to accommodate her because Kmart did not have any knowledge that she required an accomodation after she returned to work in January 1995 from her medical leave of absence.

Employment Opportunity Commission. Further, Ms. Pack contends the Court of Appeals improperly determined that a claimed disability should be evaluated taking into consideration mitigating or corrective measures, such as medication, an issue Ms. Pack correctly notes is presently before this Court on certiorari to the Ninth and Tenth Circuits.

None of the reasons stated in the Petition provides this Court with a compelling reason to exercise its discretion to grant certiorari in this case.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION THAT CONCENTRATING IS NOT A MAJOR LIFE ACTIVITY UNDER THE ADA DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *BRAGDON* THAT REPRODUCTION IS A MAJOR LIFE ACTIVITY.

In Proposition I of her Petition, Ms. Pack seeks certiorari review on the basis that the Court of Appeals' decision conflicts with this Court's decision in *Bragdon* regarding the scope of major life activities under the ADA. Certiorari review on this basis should be denied. First, in determining that concentrating is not a major life activity, the Court of Appeals stated the proper rules of law as set forth in *Bragdon* and the ADA. Second, the Court of Appeals did not misapply the rules of law, and correctly determined that while concentrating may be a significant and necessary component of a major life activity, it is not an activity in and of itself. Third, the Court of Appeals' decision is supported by the analysis set forth by the First

Circuit for determining whether an activity is a major life activity under the ADA, an analysis which is consistent with this Court's approach in *Bragdon*. Finally, certiorari review should be denied because, even if concentration is a major life activity, there was insufficient evidence at trial from which a reasonable juror could conclude Ms. Pack was "substantially limited" in the ability to concentrate, and therefore Ms. Pack still cannot prevail on appeal.

Each of these reasons for denying Ms. Pack certiorari review under Proposition I of her Petition is discussed separately below.

A. The Court of Appeals stated the proper rules of law as set forth in *Bragdon* and the ADA.

Ms. Pack contends the Court of Appeals' decision conflicts with this Court's decision in *Bragdon* regarding the scope of major life activities. *Bragdon*, which was decided over seven months prior to the Court of Appeals' decision in this case, was cited and relied upon by the Court of Appeals it in its determination of the issues before it. Ms. Pack's first argument in support of granting a writ of certiorari amounts to nothing more than a complaint that the Court of Appeals, in determining that concentrating is not a major life activity, misapplied a properly stated rule of law. Certiorari "is rarely granted" on this basis. *See* Sup. Ct. R. 10 ("[c]ertiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

The issue in *Bragdon* pertinent here was whether the activity of reproduction is a major life activity. This Court stated:

> We have little difficulty concluding that it is. As the Court of Appeals held, "[t]he plain meaning of the word 'major' denotes comparative importance" and "suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." 107 F.3d at 939, 940. Reproduction falls well within the phrase "major life activity." Reproduction and the sexual dynamics surrounding it are central to the life process itself.

Id., 118 S. Ct. at 2205. In so holding, this Court rejected the *Bragdon* petitioner's claim that Congress intended the ADA to cover only those aspects of a person's life which have a public, economic, or daily character. *Id.* This Court also noted that the ADA must be construed consistent with the regulations issued to implement the Rehabilitation Act, 42 U.S.C. § 12201(a), and that rather than enunciating a general principle for determining what is or is not a major life activity, the Rehabilitation Act regulations instead provide only a representative list. *Id.* Finally, in *Bragdon* this Court determined that reproduction is a major life activity without considering whether that activity was an important part of the individual ADA claimant's life. *Id.* at 2204-05. These were the precise rules of law set forth by this Court in *Bragdon* in holding reproduction is a major life activity under the ADA.

The rules of law set forth in *Bragdon* were dutifully applied by the Court of Appeals in this case. The Court of Appeals quoted *Bragdon's* teaching that "the touchstone for determining an activity's inclusion under the statutory rubric is its significance." 166 F.3d at 1305 (quoting

Bragdon, 118 S. Ct. at 2205). The Court of Appeals did not apply the test rejected by *Bragdon* that an activity must have some public, economic, or daily character to be a major life activity. Like this Court in *Bragdon*, the Court of Appeals noted that major life activities "include, but are not limited to" those set forth in the EEOC regulations. 166 F.3d at 1305. Finally, as Ms. Pack concedes, the Court of Appeals properly concluded that "[i]n deciding whether a particular activity is a 'major life activity,' we ask whether that activity is significant within the meaning of the ADA, rather than whether that activity is important to the particular individual." *Id.* (citing *Bragdon*, 118 S. Ct. at 2204-05). *See* Petition at 6, n.3.

In addition to properly setting forth the legal guideposts gleaned from *Bragdon*, the Court of Appeals properly stated the applicable statutory rules governing Ms. Pack's claim. Ms. Pack does not argue otherwise. *See* Petition at 4 ("[a]fter reciting the controlling principles governing the ADA . . .").

Thus, Ms. Pack is left to argue the Court of Appeals misapplied properly stated rules of law. Under this Court's rules, misapplication of properly stated rules of law is not a compelling reason to grant certiorari review.

B. The Court of Appeals did not misapply the governing rules of law, and correctly determined that while concentrating may be a significant and necessary component of a major life activity, it is not an "activity" in and of itself.

In determining that concentrating is not a major life activity, the Court of Appeals stated: "[c]oncentration may be a significant and necessary component of a major life

activity, such as working, learning, or speaking, but it is not an 'activity' itself." 166 F.3d at 1305. The Court of Appeals' decision is correct.

Ms. Pack contends the Court of Appeals' decision "advances no credible rationale for concluding that concentration is not a major life activity." Petition at 7. Contrary to Ms. Pack's contention, the Court of Appeals advanced the rationale that concentrating is not an activity in and of itself, but rather is a component, or function, of major life activities. Because application of the ADA is limited to physical or mental impairments which substantially limit "major life activities," not "major life functions" or "components" of major life activities, the conclusion of the Court of Appeals is correct and its reasoning is sound.

The plain difference between the definition of "activity" and the definition of "function" supports the Court of Appeals' decision. "Activity" is defined as "[t]he state or quality of being active; action; vigorous movement; active force or operation." *Funk & Wagnalls New Comprehensive International Dictionary of the English Language* (1982). "Function" is defined as "[t]he proper employment of faculties or powers." *Id.* There is, plainly, a difference between an "activity" and a "function". Concentrating is a mental faculty. While the proper employment of the faculty of concentrating, *i.e.*, the function of concentrating, may be necessary to engage in an activity, there is nothing active about concentrating in and of itself.

That is not to say something cannot be both an activity in and of itself as well as a function or component of another activity. The examples cited by Ms. Pack in the Petition

are illustrative. Thus, standing is an activity in and of itself, and is also a function or component of walking. But concentrating cannot stand alone as an activity. Concentrating cannot take place in a vacuum. It can only be a function of an activity. One does not go "to concentrate" for the sake of concentrating. Rather, one concentrates on the activity in which one is engaged. Even if the activity is "mental" (such as thinking or pondering) concentrating is simply a component, a component which enables one to focus on whatever subject is on the person's mind. But again, concentrating is not in and of itself an "activity" in which a person solely engages.

Ms. Pack helps bring home this distinction when she proposes that concentrating should be a major life activity because it is "one of our most basic cognitive *functions*." Petition at 8 (emphasis added). Ms. Pack then directs the Court's attention to articles and studies on attention deficit disorders and the like. *Id.* at 9. But what these articles and studies show is that the inability to properly employ the faculty of concentrating is symptomatic to the diagnosis of a mental impairment. For instance, it is a child's inability to concentrate which leads to the diagnosis of ADD, not the fact a child has ADD which limits the ability to concentrate. In turn, the inability of a child to concentrate — the impairment of ADD — is what limits the ability of a child to engage in major life activities.[4]

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4. Indeed, in this case Ms. Pack's psychiatrist diagnosed her as having major depression, moderate to severe, based in part on his initial observation that she had "decreased attention/ concentration," one of the symptoms of her mental impairment. As noted in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed. 1994), the

(Cont'd)

Ms. Pack further helps draw this distinction when she states to concentrate is to "employ all one's thoughts or attention or effort *on something*." Petition at 9 (citing *Oxford American Dictionary* (Oxford 1980)) (emphasis added). That "something" is the activity in which the person is engaged. One can examine each of the major life activities listed in the EEOC regulations — caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, *see* 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2)(1997) — and see that the ability to concentrate is a component in each. However, the ability to concentrate is not an activity in and of itself.

Accordingly, the Court of Appeals properly applied the governing rules of law in determining that while concentrating may be a significant and necessary component of a major life activity, it is not a major life activity under the ADA.

(Cont'd)
diminished ability to concentrate is one of the criteria for a diagnosis of major depression. *Id.* at p. 327. If the function of concentrating is both a symptom resulting in the diagnosis of impairment as well as the major life activity, the three-step process outlined in *Bragdon* for determining the existence of a disability — (1) whether there is a physical or mental impairment (2) that substantially limits (3) a major life activity — would be collapsed into one step—the determination of the impairment. Nothing in *Bragdon* or in the ADA remotely suggests that the disability inquiry should begin and end with the simple finding of an impairment.

C. The First Circuit's analysis in *Soileau v. Guilford of Maine, Inc.* also provides a sound basis for determining concentrating is not a major life activity under the ADA.

Although not relied upon by the Court of Appeals in this case, the First Circuit's analysis in *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997), provides a sound basis for supporting the conclusion that concentrating is not a major life activity under the ADA. In *Soileau* the First Circuit rejected one of the newly expanded major life activities listed in the *Guidance on Psychiatric Disabilities and the Americans with Disabilities Act*, EEOC Compliance Manual (BNA) No. 59 (March 27, 1997) ("EEOC Guidance"), that of "interacting with others." In doing so, the First Circuit provided the following analysis:

> The concept of "ability to get along with others" is remarkably elastic, perhaps so much so as to make it unworkable as a definition. While such an ability is a skill to be prized, it is different in kind from breathing or walking, two exemplars which are used in the regulations. Further, whether a person has such an ability may be a matter of subjective judgment; and the ability may or may not exist depending on context. Here, Soileau's alleged inability to interact with others came and went and was triggered by vicissitudes of life which are normally stressful for ordinary people — losing a girlfriend or being criticized by a supervisor.

105 F.3d at 15.

Applying the same analysis here, it is equally clear the EEOC Guidance's inclusion of concentrating as a major

life activity should be rejected as well. Like "interaction with others," the concept of concentrating is elastic, and the ability of a person to concentrate on an activity is a matter of subjective judgment and is affected by day-to-day occurrences stressful to ordinary people.

Again, the definition of "concentration" is to direct one's attention or thoughts on something. The term "concentration" is at least equally elastic and amorphous a concept as "the ability to interact with others." Indeed, under the facts presented at trial in this case, Ms. Pack's alleged inability to concentrate came and went and was "triggered by vicissitudes of life which are normally stressful for ordinary people" — here, admitted family problems and criticism by her supervisor at work.

From our everyday experiences we know we are able to concentrate better on some days than others, for a wide variety of reasons. And the level of concentration needed varies greatly from activity to activity. But the ability to concentrate and the level at which one is concentrating are such elastic concepts that concentrating should not be deemed a major life activity under the ADA.

D. This Court should deny certiorari review because, even if Ms. Pack is granted the relief she seeks, she still cannot prevail on appeal. There was insufficient evidence at trial from which a reasonable juror could conclude Ms. Pack was "substantially limited" in the ability to concentrate.

Assuming concentrating is a major life activity, Ms. Pack did not present legally sufficient evidence that her mental impairment "substantially limited" her ability to

concentrate. Therefore, certiorari review should be denied because the District Court's directed verdict should still be affirmed.

The relevant ADA regulations state an individual is substantially limited when he or she is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). The factors to be considered in determining whether an individual is substantially limited in a major life activity are (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact, or the expected permanent or long-term impact, of or resulting from the impairment. *Id.* § 1630.2(j)(2). The District Court and the Court of Appeals properly applied these factors in their respective decisions. 166 F.3d at 1305.

Tellingly, Ms. Pack states in her Petition:

> Any concern that the ability to concentrate cannot be adequately measured for comparison to the average in the general population is

> misplaced. The ability to concentrate can be reasonably evaluated with a variety of reliable psychological tests, most notably the Wechsler Adult Intelligence Scale-Revised (WAIS-R).

Petition at 9, n.6 (citations omitted). *Yet, Ms. Pack presented no evidence at trial measuring her ability to concentrate as compared to the average person in the general population.* While she had every opportunity to present such evidence at trial, she did not. It is far too late to state that evidence sufficient to make out a prima facie case *could* be gathered and offered, when trial has concluded and such evidence was not presented.[5]

Further, Ms. Pack's expert's notes from his visit with Ms. Pack on December 30, 1994 (shortly before her return to work in January 1995) state that "[Ms. Pack's] attention/ concentration has been good, memory has been good." Aplt. App. at 519. Dr. Koduri made no mention in his testimony or his notes of meetings thereafter of any problem with Ms. Pack's ability to concentrate. Instead, Dr. Koduri noted from his January 17, 1995 meeting that Ms. Pack was "relaxed" and "able to function fine," *id.* at 521; and noted from his January 24, 1995 meeting that "[Ms. Pack] does acknowledge that she has been functioning well outside the workplace." *Id.* at 522. So, during the relevant time period — after Ms. Pack returned to work on January 5, 1995 — there is absolutely no evidence she had problems concentrating, and in fact the evidence demonstrated her ability to concentrate was good and she was functioning well.

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5. There were no pretrial rulings prohibiting Ms. Pack from gathering or offering the evidence she now says would sustain her burden.

Plainly, even if this Court were to grant certiorari and hold concentrating is a major life activity, the District Court's directed verdict should still be affirmed because Ms. Pack failed to offer legally sufficient evidence that her mental impairment substantially limited her ability to concentrate.

II. THE COURT OF APPEALS' HOLDING THAT CONCENTRATING IS NOT A MAJOR LIFE ACTIVITY IS NOT IN CONFLICT WITH THE DECISION OF THE ELEVENTH CIRCUIT IN *PRITCHARD v. SOUTHERN COMPANY SERVICES*, AND THE EEOC GUIDANCE IS NOT BINDING ON COURTS.

Ms. Pack next attempts to justify certiorari review under the rules of this Court by contending the decision of the Court of Appeals is in conflict with the decision of the Eleventh Circuit in *Pritchard v. Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996), *amended on other grounds*, 102 F.3d 1118, *cert. denied*, 117 S. Ct. 2453 (1997), and the EEOC Guidance. The Court of Appeals' decision is not in conflict with *Pritchard*, and any conflict with the EEOC Guidance, which is not binding on courts, is not a compelling reason to grant certiorari review.

Ms. Pack concedes the Court of Appeals' decision is not in conflict with *Pritchard,* a case decided nearly two years prior to *Bragdon* (and therefore devoid of any post-*Bragdon* analysis), when she states "[t]he Eleventh Circuit did not squarely hold concentration to be a major life activity as that precise issue was not directly decided by the District Court." Petition at 11. Indeed, not only did the Eleventh Circuit fail to address the question of whether concentrating

(or the ability to function, sleep, and communicate, the other major life activities alleged by the plaintiff in *Pritchard*) is a major life activity, it did not even discuss any framework from which the district court in that case was to determine whether concentrating is a major life activity. The *Pritchard* Court simply remanded the case to the district court because there were genuine issues of material fact as to whether the plaintiff was disabled under the ADA.

In fact, the Court of Appeals' holding in this case that concentrating is not a major life activity under the ADA does not present a conflict among the circuit courts of appeal on an issue of law. There is no holding or reasoning from any other circuit court of appeal that concentrating is a major life activity under the ADA.[6]

Next, Ms. Pack contends this Court should grant certiorari review because the Court of Appeals' decision conflicts with the EEOC Guidance. The Court of Appeals quite correctly stated that "[w]hile the EEOC's guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference." 166 F.3d at 1305 n.5 (citing *Sutton v. United Airlines, Inc.*, 130 F.3d 893, 899 n.3 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999) (No. 97-1943)). The EEOC Guidance (as opposed to the EEOC regulations) is not issued pursuant to the Administrative Procedures Act

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6. Petitioner also cites *Sherback v. Wright Automotive Group*, 987 F. Supp. 433 (W.D. Pa. 1997). *Sherback* was also decided prior to *Bragdon*, fails to state any rationale for finding that concentrating is a major life activity under the ADA, and, being a district court opinion, does not meet the criteria for establishing a compelling reason to grant certiorari review.

and is, therefore, not binding on the courts. Moreover, the EEOC Guidance contains no reasoning the merits of which this Court can evaluate were it to grant certiorari review.

In sum, Ms. Pack has failed to identify a conflict of the kind this Court should exercise its discretion to review on certiorari.

III. THE COURT OF APPEALS, IN HOLDING THERE WAS INSUFFICIENT EVIDENCE AT TRIAL FROM WHICH A REASONABLE JUROR COULD CONCLUDE MS. PACK WAS "SUBSTANTIALLY LIMITED" IN THE ABILITY TO SLEEP, DID NOT BASE ITS CONCLUSION ENTIRELY ON THE ABILITY TO CONTROL MS. PACK'S SLEEP THROUGH MEDICATION. THEREFORE, EVEN IF THIS COURT AGREES IN THE OTHER CASES BEFORE IT THAT A DISABILITY SHOULD BE MEASURED WITHOUT REGARD TO MITIGATING CIRCUMSTANCES, CERTIORARI REVIEW IS NOT WARRANTED.

Ms. Pack correctly notes this Court has pending before it on certiorari review a trio of ADA cases which include the issue of whether a disability should be evaluated without regard to mitigating or corrective measures. Two of the pending cases are from the Tenth Circuit, which holds that mitigating or corrective measures should be considered when determining whether one is disabled under the ADA. *See Sutton v. United Airlines, Inc.*, 130 F.3d 893, 902 (10th

Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999) (No. 97-1943); *Murphy v. United Parcel Service, Inc.*, 141 F.3d 1185 (10th Cir.) (unpubl.), *cert. granted*, 67 USLW 3027 (Jan. 8, 1999) (No. 97-1992). *See also Albertson's, Inc. v. Kirkingburg*, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 791 (1999) (No. 98-591). Ms. Pack argues the Court of Appeals determined in this case she was not substantially limited in the major life activity of sleeping because of medication.

While it is true the Court of Appeals made mention of its position that mitigating or corrective measures should be considered when determining whether one is disabled under the ADA, *see* 166 F.3d at 1305-06, the Court of Appeals applied this rule as an *additional* reason for concluding that Ms. Pack failed to present evidence of the extent to which her impairment limited her major life activity of sleeping. The Court of Appeals stated:

> While the evidence showed Pack had episodes of sleep disruption and/or waking without feeling rested during 1994 and January 1995, there is no indication that her sleep problems were severe, long term, or had a permanent impact. [n.6] *Additionally*, Dr. Koduri was able to generally control Pack's sleep problems with medication, even going too far in some instances, resulting in making her too sleepy or drowsy. *See id.* at 505 and 508. Pack failed to satisfy her burden to present evidence of her impairment and the extent to which the impairment limited her major life activity of sleeping. Therefore, the district court did not err in determining that Pack failed to show her

> depression substantially limited her in the major life activity of sleep.

166 F.3d at 1306 (emphasis added). In footnote 6 of the Court of Appeals' opinion it stated: "[w]e note that the EEOC agrees that '[s]leeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully.' " *Id.* (citing EEOC Guidance at E-2 n.16.)[7]

Thus, even if this Court holds in the cases already pending on certiorari that a disability should be evaluated without regard to mitigating or corrective measures, certiorari review should be denied. Both the District Court and the Court of Appeals correctly determined, and Ms. Pack does not argue otherwise in the Petition, that there was absolutely no evidence at trial comparing Ms. Pack's sleep with the sleep of an average person in the general population, or of any indication that her sleep problems were severe, were long term, or had a permanent impact. Both Ms. Pack and *Amicus Curiae* EEOC, apparently realizing this deficiency in Ms. Pack's evidence, cited in their briefs to the Court of Appeals various sources and stated as a fact the number of hours the average adult sleeps a day, and the average hours of sleep required for an adult. Petitioner's Opening Brief to the Court of Appeals at 18; Brief of Amicus Curiae to Court of Appeals at 14. Neither this evidence nor any other evidence concerning the sleep habits or requirements of an average person in the general population was presented at trial. There was not even any

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7. The District Court, which also held Ms. Pack's evidence was legally insufficient to establish she was substantially limited in the ability to sleep, *did not* take into account corrective measures in making this determination. *See* Petition, App. B-3.

evidence at trial of the number of hours of sleep a night Ms. Pack had throughout the relevant time period. This lack of required evidence prompted the Court of Appeals to note:

> Additionally, we note that Pack failed to present any evidence regarding the ability to sleep of the average person in the general population which would have significantly aided the trier of fact in a situation like this where there is a dearth of other evidence.

166 F.3d at 1306 n.7 (citing *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 644 (2d Cir. 1998) ("Difficulty sleeping is extremely widespread. Colwell made no showing that his affliction is any worse than is suffered by a large portion of the nation's adult population.").

It is axiomatic that a party may not present evidence on appeal that was not before the trial court. *See, e.g., United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) ("documents or facts not presented to the district court are not part of the record on appeal"); *Anderson v. Cumming*, 827 F.2d 1303, 1305 (9th Cir. 1987) (the appealing party must insure that sufficient facts are developed at trial to support a challenge on appeal). In the absence of any evidence of the number of hours Ms. Pack was able to sleep during the relevant time period, or how her amount of sleep compared to the amount of sleep obtained by the average person in the general population, or whether her alleged sleep problems were severe, were long term, or had a permanent impact, there was simply no evidence from which a reasonable juror could have found Ms. Pack "substantially limited" in the major life activity of sleeping.

Accordingly, this Court's decision in the cases pending before it on whether mitigating measures should be considered in determining whether an impairment substantially limits a major life activity will not decide this case. Even if mitigating measures are not to be considered, the evidence presented by Ms. Pack was legally insufficient to present the issue of substantial limitation to the jury. Both the District Court and the Court of Appeals so held, and Ms. Pack does not challenge these holdings. Therefore, this Court should exercise its discretion to deny certiorari review on Proposition III of the Petition.[8]

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8. In support of her Proposition III Ms. Pack simply adopts by reference the arguments advanced by the petitioners in *Sutton* and *Murphy*, and the respondent in *Kirkingburg*. Kmart similarly adopts by reference the arguments advanced in the briefs in those cases which support the conclusion reached by the Court of Appeals that mitigating or corrective measures should be considered when determining whether an impairment substantioally limits a major life activity.

CONCLUSION

Kmart respectfully requests the Court deny Ms. Pack's Petition for a Writ of Certiorari, as Ms. Pack has failed to provide any basis under Sup. Ct. R. 10 for this Court to exercise its discretion to review this case. In determining whether concentrating is a major life activity under the ADA, the Court of Appeals applied the proper rules of law set forth by this Court in *Bragdon*. Moreover, the Court of Appeals' decision on this issue is not in conflict with the decision of the Eleventh Circuit in *Pritchard*, nor the decision of any other United States Court of Appeals. Finally, the issue of whether corrective measures should be considered in determining whether an impairment substantially limits a major life activity will have no bearing on the Court of Appeals' decision in this case, as the evidence presented by Ms. Pack at trial was legally insufficient to demonstrate a substantial limitation on her ability to sleep irrespective of whether corrective measures are considered.

Respectfully submitted,

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